

MAR 17 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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2009 MAR 17 P 4: 49

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5833

DATE COMPLAINT FILED: Oct. 4, 2006

DATE OF NOTIFICATION: Oct. 11, 2006

DATE OF LAST RESPONSE: Dec. 1, 2006

DATE ACTIVATED: Jan. 24, 2007

EXPIRATION OF SOL: Oct. 1, 2011

COMPLAINANT:

Ohio Republican Party

RESPONDENTS:

Ohio Democratic Party and Dean DePiero, in his
official capacity as treasurer
Friends of Sherrod Brown and Eileen Gallagher, in
her official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(8), (9), (17), (18)

2 U.S.C. § 434(b)

2 U.S.C. § 434(g)

2 U.S.C. § 441a(a)(2)(A)

2 U.S.C. § 441a(f)

2 U.S.C. § 441d

11 C.F.R. § 100.27

11 C.F.R. § 100.52

11 C.F.R. § 100.80

11 C.F.R. § 100.87

11 C.F.R. § 100.111(a)

11 C.F.R. § 100.140

11 C.F.R. § 100.147

11 C.F.R. § 100.22(a) and (b)

11 C.F.R. § 104.4(a) and (b)

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

The complainant in this matter alleges that the cost of an Ohio Democratic Party ("ODP") mailing featuring Democratic Senatorial candidate Sherrod Brown may have constituted an excessive contribution from the ODP to Friends of Sherrod Brown and Eileen Gallagher, in her official capacity as treasurer ("Brown Committee"). Further, the complainant alleges that the ODP failed to indicate on the mailing whether it was authorized by a candidate or candidate's committee, thereby violating the disclaimer requirements of the Federal Election Campaign Act of 1971, as amended ("the Act").

After review of the complaint, responses and other available information, we recommend that the Federal Election Commission ("Commission") find reason to believe that the ODP violated 2 U.S.C. § 441d by failing to include with the mailing a proper disclaimer stating whether it was authorized by a candidate or a candidate committee. Further, we recommend that the Commission find reason to believe that the ODP violated 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2) and 11 C.F.R. § 104.4(a) and (b)(2) by failing to properly disclose the cost of the mailing as an independent expenditure by the ODP on behalf of the Brown Committee. Finally, because we conclude that the ODP made an independent expenditure on behalf of the Brown Committee rather than a coordinated expenditure, we recommend that the Commission find no reason to believe that the Brown Committee violated 2 U.S.C. § 441a(f) by receiving an excessive in-kind contribution, and close the file as to the Brown Committee, and that the Commission find no reason to believe the ODP violated 2 U.S.C. § 441a(a)(2)(A) and (f) by making an excessive in-kind contribution to the Brown Committee.

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II. FACTUAL BACKGROUND

Before the 2006 general election, the ODP paid \$157,754 to create and disseminate a four-page mailing featuring two Democratic Party candidates, Ted Strickland (for Governor) and Sherrod Brown (for United States Senate). Complaint, Exhibit A; ODP Response at 1. The mailing encouraged individuals to "vote by mail" for these two candidates and to "turn around Ohio" and "fight . . . corruption in Columbus and Washington." Complaint, Exhibit A at 2-3. It also featured photographs of George W. Bush and former Senator Mike DeWine, and stated that "you don't have to wait until Election Day to send them a message." *Id.* at 1. The mailing stated that Ted Strickland and Sherrod Brown would "put an end to corporate tax breaks that cost taxpayers millions and have left Ohio's families with the third worst tax burden in the nation." *Id.* at 3. It highlighted Sherrod Brown's refusal "to accept the free health care benefits provided members of Congress until all Ohio families have access to adequate care" and argued that Strickland and Brown would "expand job growth by investing in entrepreneurship, innovation, and energy production" and that they would "provide access to world-class schools" to "challenge and prepare our children for the next-generation workforce." *Id.* The mailing concluded with: "Ohio Democrats provide the change we need." *Id.* at 4. A disclaimer in a printed box stated that the mailing was "Paid for by the Ohio Democratic Party," and the ODP's street address appeared as a return address above the box. *Id.* at 4. ODP disclosed the disbursement for the mailing on Schedule B of its 2006 Pre-General Report, filed with the Commission on October 24, 2006, and listed the purpose as "printing exempt slate card."

The complainant alleges that, based on the ODP's "fail[ure] to allocate and report" the cost of the mailing, the ODP "may have made an excessive contribution" to the Brown Committee. Further, the complainant alleges that the ODP may have attempted to fund the

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1 mailing under either the volunteer materials or slate card exemption, but asserts that the mailing
2 did not qualify for either exemption because it was mailed by a commercial entity and did not
3 list three or more candidates. Finally, the complainant alleges that the ODP violated the
4 disclaimer requirements at 2 U.S.C. § 441d(a) because the mailing did not state whether it was
5 authorized by any candidate or candidate committee.

6 In its response to the complaint, the ODP concedes that, because of miscommunication
7 amongst its staff, the mailing at issue was handled by a direct mail company rather than by
8 volunteers. The ODP asserts that, "to the best of [its] knowledge," Sherrod Brown's campaign
9 "had little or no participation in the creation or dissemination of this particular mail piece." The
10 Brown Committee responds that it was aware that the ODP had a mail program, but it did not
11 have any information regarding the mailing at issue and "believes it is unlikely that any
12 employees or agents of the Brown Committee reviewed this piece prior to when the Ohio
13 Democratic Party mailed it" because it featured a photograph of Sherrod Brown that the
14 Committee would not have recommended that the ODP use. Further, the Brown Committee
15 argues that it was not responsible for supervising ODP volunteers or ODP mailings to ensure
16 that they complied with statutory requirements, and requests that it be dismissed as a
17 respondent.

18 III. LEGAL ANALYSIS

19 As an initial matter, we must determine whether the Commission's volunteer activity
20 exemption or slate card exemption apply to the circumstances of this matter. If the pamphlet
21 qualified for the volunteer activity exemption, *see* 11 C.F.R. §§ 100.87 and 100.147, or the slate
22 card exemption, *see* 11 C.F.R. §§ 100.80 and 100.140, the disclaimer on the pamphlet would
23 not have had to state whether the pamphlet was authorized by any candidate, *see* 11 C.F.R.

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1 § 110.11(e), would have been properly reported, and the costs associated with it would not have
2 constituted a contribution or an expenditure, and would not have been subject to contribution or
3 coordinated expenditure limits, *see* 2 U.S.C. § 431(8)(B)(v), (x) and (9)(B)(iv), (viii). If the
4 pamphlet did not qualify for either exemption, the disclaimer on the pamphlet would have had
5 to state whether the pamphlet was authorized by any candidate, *see* 11 C.F.R. § 110.11(b), and
6 depending on its content and whether it was coordinated with a candidate, the cost of the
7 pamphlet might be considered and reported as an independent expenditure, a coordinated party
8 expenditure, or an in-kind contribution, the latter two of which are subject to statutory limits.
9 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d)(3).

10 **A. The Pamphlet Is Not Exempt Activity**

11 Pursuant to the Federal Election Campaign Act of 1971, as amended ("the Act"), the
12 ODP was permitted to contribute \$5,000 directly to the Brown Committee for the 2006 election
13 cycle. 2 U.S.C. § 441a(a)(2)(a) and (b). In addition, the ODP was permitted to make
14 coordinated party expenditures in connection with the general election campaign of candidates
15 for Federal office, pursuant to requirements and limitations of 2 U.S.C. § 441a(d). A
16 contribution or expenditure is a purchase, payment, distribution, loan, advance, deposit or gift
17 of money or anything of value, made for the purpose of influencing an election for Federal
18 office. *See* 2 U.S.C. §§ 431(8)(A)(i) and 431(9)(A)(i); 11 C.F.R. §§ 100.52 and 100.111(a)
19 (defining "contribution" and "expenditure"). The term "anything of value" includes in-kind
20 contributions of goods and services. 11 C.F.R. § 100.52(d)(1). However, under the volunteer
21 materials exemption, the payment by a state or local party committee of the costs of campaign
22 materials used in connection with volunteer activities on behalf of any nominee of such party
23 are not contributions or expenditures provided that, *inter alia*, the materials are distributed by

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1 volunteers and not by commercial or for-profit entities. 11 C.F.R. §§ 100.87 and 100.147.
2 Similarly, under the slate card exemption, costs associated with the preparation, display, or
3 mailing or other distributions of a printed slate card are not contributions or expenditures.
4 11 C.F.R. §§ 100.80 and 100.140. In order to qualify as a slate card, a communication must list
5 three or more candidates for any public office for which an election is held in the state in which
6 the committee is organized. *Id.*

7 In this matter, it appears that the ODP pamphlet does not qualify for either exemption.
8 The complainant asserts that the pamphlet bears a commercially-printed address label and
9 postage and was not mailed by volunteers and thus did not qualify as volunteer activity. In fact,
10 the ODP concedes that the pamphlet was supposed to have been mailed by volunteers, but was
11 mistakenly mailed by a direct mail company. Further, it is apparent on the face of the pamphlet
12 that it does not feature the requisite three candidates to qualify as a slate card. As a result, it
13 appears that the pamphlet does not qualify as exempt activity.

14 **B. Disclaimer Violation**

15 Had the pamphlet qualified as exempt activity, the disclaimer on the pamphlet would
16 not have had to state whether the pamphlet was authorized by any candidate. 11 C.F.R.
17 § 110.11(e). However, because the pamphlet was not exempt activity, other disclaimer
18 requirements apply. All mass mailings paid for by a political committee (as well as any other
19 type of general public political advertising by a political committee), whether coordinated with
20 a candidate and/or a candidate's committee, or not, must display a disclaimer. 2 U.S.C.
21 § 441d(a); 11 C.F.R. § 110.11(a)(1); *see* 11 C.F.R. § 100.27. If not authorized by a candidate
22 or candidate committee, the disclaimer must state the full name and permanent street address,
23 telephone number, or World Wide Web address of the entity that paid for the communication

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1 and that the communication is not authorized by any candidate or candidate's authorized
2 committee. 2 U.S.C. § 441d(a)(3), 11 C.F.R. §§ 110.11(b)(3) and (d)(3). If authorized by a
3 candidate or candidate committee, the disclaimer must identify the committee that made the
4 expenditure and must state that the communication is authorized by the candidate or the
5 candidate's authorized committee. 2 U.S.C. § 441d(a)(2), 11 C.F.R. § 110.11(d)(1) and (2).
6 All disclaimers must appear in a printed box that is set apart from the other contents of the
7 communication. 2 U.S.C. § 441d(c)(2), 11 C.F.R. § 110.11(c)(2)(ii).

8 The disclaimer at issue here stated only: "Paid for by the Ohio Democratic Party."
9 Thus, whether the pamphlet was authorized by Sherrod Brown or the Brown Committee, or not,
10 the disclaimer failed to meet the applicable statutory and regulatory requirements for
11 disclaimers. If not authorized by Sherrod Brown or the Brown Committee, it failed to meet the
12 disclaimer requirement because it did not include within a printed box the street address,
13 telephone number, or World Wide Web address of the ODP and did not state whether it was
14 authorized by any candidate. If authorized by Sherrod Brown or the Brown Committee, it
15 failed to meet the disclaimer requirement because it did not state that it was authorized by
16 Sherrod Brown or his committee. Accordingly, we recommend that the Commission find
17 reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as
18 treasurer, violated the disclaimer requirements of 2 U.S.C. § 441d.

19 **C. Excessive Contribution to the Brown Committee**

20 The complainant in this matter alleges that the ODP made an excessive contribution
21 based on its "fail[ure] to allocate" the cost of the mailing. As previously discussed, the ODP
22 was permitted to make expenditures on behalf of the Brown Committee. However, the cost of
23 creating and disseminating the mailing could potentially result in a coordinated party

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1 expenditure or an in-kind contribution if the ODP coordinated the mailing with the Brown
2 Committee. *See* 11 C.F.R. § 109.37(b) (a payment by a political party committee for a
3 communication that is coordinated with a candidate must be treated by the political party
4 committee as either an in-kind contribution or a coordinated party expenditure). If the Brown
5 Committee coordinated the mailing, the expenditure would be a coordinated party expenditure
6 under the Act or an in-kind contribution. If, however, the mailing was not coordinated with
7 Sherrod Brown or the Brown committee, and the mailing expressly advocates for the election or
8 defeat of Sherrod Brown, a Federal candidate, the expenditure would be an independent
9 expenditure by the ODP on behalf of the Brown Committee. 2 U.S.C. § 431(17).

10 The complainant in this matter makes no specific allegation of coordination, and
11 presents no facts suggesting that the Brown Committee became materially involved in, made a
12 request or suggestion or had substantial discussions with the ODP regarding the production or
13 dissemination of the communication. 11 C.F.R. § 109.21(a). Further, the Brown Committee
14 denies that it had any information about the mailing. We are also not aware of any publicly
15 available information suggesting that the ODP and the Brown Committee coordinated to
16 produce and disseminate the mailing. Absent information suggesting coordination, it is
17 reasonable to infer that the disbursement related to the mailing was not a coordinated
18 expenditure by the ODP on behalf of the Brown Committee, and therefore the cost of the
19 mailing is not a contribution to the Brown Committee. Therefore, we recommend that the
20 Commission find no reason to believe that Friends of Sherrod Brown and Eileen Gallagher, in
21 her official capacity as treasurer, violated 2 U.S.C. § 441a(f), and close the file as to these
22 respondents. In addition, we recommend that the Commission find no reason to believe that the

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Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and (f).

D. Reporting Violation

Because the available information does not suggest that the communication was coordinated, we now examine whether the cost of the mailing was properly reported as a disbursement on Schedule B or whether it qualifies as an "independent expenditure." Disbursements made for a communication result in an independent expenditure if the communication "expressly advocate[es] the election or defeat of a clearly identified candidate," and is not made in cooperation or consultation with the candidate, the candidate's authorized political committee, or their agents. 2 U.S.C. § 431(17)(A)-(B). The candidate is "clearly identified" when the name or photo of the candidate appears in the communication. 2 U.S.C. § 431(18)(A) and (B). The Act requires that independent expenditures by a political committee on behalf of a Federal candidate be disclosed as such in reports filed with the Commission. A political committee must report independent expenditures that exceed \$200 each, or those made on behalf of the same candidate that aggregate over \$200 during the calendar year on Schedule E of FEC Form 3X at the end of the first reporting period following the expenditure. 2 U.S.C. § 434(b)(4)(H)(iii) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a).

As previously explained, absent coordination, an expenditure made on behalf of a political committee, containing express advocacy, is an independent expenditure and should be reported as such.¹ Under the Commission's regulations, a communication contains express

¹ Although a reporting obligation arises from an independent expenditure, the Commission has taken different approaches to analyzing such violations in MURs where the principal issue is compliance with disclaimer requirements. *Compare* MUR 5281(American Muslim Council) (analyzing whether costs for certain express advocacy communications should have been reported as independent expenditures) *with* MUR 5865 (New Trier Democratic Organization) (Commission did not reach the issue of whether the costs for certain express advocacy flyers should have been reported as independent expenditures).

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1 advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or
2 "Smith for Congress," or uses campaign slogans or words that in context have no other
3 reasonable meaning than to urge the election or defeat of one or more clearly identified
4 candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One,"
5 "Carter '76," "Reagan/Bush," or "Mondale!" *See* 11 C.F.R. § 100.22(a); *see also MCFL*, 479
6 U.S. at 249 ("[The publication] provides in effect an explicit directive: vote for these (named)
7 candidates. The fact that this message is marginally less direct than "Vote for Smith" does not
8 change its essential nature."). The Commission's regulations further provide that express
9 advocacy includes communications containing an "electoral portion" that is "unmistakable,
10 unambiguous, and suggestive of only one meaning" and about which "reasonable minds could
11 not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a
12 whole and with limited reference to external events, such as the proximity to the election.
13 11 C.F.R. § 100.22(b).

14 Here, the mailing expressly advocates the election of Sherrod Brown when it urges voters
15 to "vote by mail" for Brown in order to "turn around Ohio" and "fight...corruption in Columbus
16 and Washington." In addition, the mailing expressly advocates the defeat of Brown's opponent,
17 Senator Mike DeWine, when it says next to a photo of DeWine that "you don't have to wait for
18 Election Day to send them a message" and encourages voters to vote early by mail. Thus, the
19 communication uses campaign slogans or words that in context have no other reasonable
20 meaning than to urge the election of Sherrod Brown or the defeat of his electoral opponent, Mike
21 DeWine. 11 C.F.R. § 100.22(a). It also appears that this advertisement contains express
22 advocacy within the meaning of 11 C.F.R. § 100.22(b) because reasonable minds could not differ

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as to whether the ad encourages actions to elect or defeat a candidate" when taken as a whole and with limited reference to external events, such as the proximity to the election.

Accordingly, the mailing was an independent expenditure by the ODP on behalf of the Brown Committee and should have been reported on Schedule E itemizing the cost of the communication as an independent expenditure, rather than as a disbursement on Schedule B.

Further, the ODP failed to file the required initial 48-hour notice of an independent expenditure. A political committee that makes independent expenditures "aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours." 2 U.S.C. § 434(g)(2)(A); *see* 11 C.F.R. § 104.4(b)(2). Each 48-hour report must contain information indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. 2 U.S.C. § 434(b)(4)(H)(iii). ODP's independent expenditure for the communication exceeded \$10,000 and was made in early October, over 20 days from the election, and therefore was required to be reported on a 48-hour notice.

Accordingly, we recommend that the Commission find reason to believe that the ODP violated 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii), and 11 C.F.R. § 104.4(a) by failing to disclose an independent expenditure totaling \$157,754 on Schedule E, and 2 U.S.C. § 434(g)(2) and 11 C.F.R. § 104.4(b)(2) by failing to file a 48 Hour Notice relating to the same independent expenditure.

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V. RECOMMENDATIONS

1. Find reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated 2 U.S.C. §§ 441d, 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2) and 11 C.F.R. § 104.4(a) and (b)(2);
2. Find no reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and (f);
3. Find no reason to believe that Friends of Sherrod Brown and Eileen Gallagher, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f), and close the file with respect to them;
4. Approve the attached Factual and Legal Analyses;
- 5.
6. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

Date

3-16-09

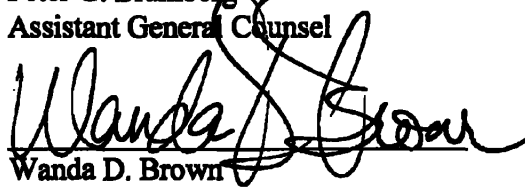
BY:

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Deputy Associate General Counsel
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